A number of the resulting policies adopted by the ABA as a whole are relevant to this Court's efforts to formulate and apply standards for review of *Schlup* or *Hererra* "actual innocence" claims.

1. Biological Evidence Principles. "Three developments in the 1990s dramatically altered the judicial approach to scientific evidence." ABA Report, *Crime Laboratories and Forensic Evidence*, No. 111B, at 2 (Aug. 2004). First, the advent of more precise DNA profiling "revolutionized forensic science." *Id.*[10] Second, this Court's triumvirate of evidentiary decisions "revolutionized the admissibility of evidence based on forensic science." *Id.* at 3.[11] And third, forensic "abuse" cases involving hair sampling and pre-DNA serological evidence led to "nationwide criticism of forensic evidence in general." *Id.* at 5 (quoting *Ramirez* v. *State*, 810 So. 2d 836, 853 (Fla. 2001)).[12]

These developments led the ABA in 2000 to adopt a set of "Principles Concerning Biological Evidence." These principles recommend that "[a]ll biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law." App. 8a.

The revolution in DNA testing was in its infancy in the early 1990s, when this Court's opinions in *Herrera* and

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[10] *See, e.g.*, *Harvey*, 285 F.3d at 306 (separate opinion of Luttig, J., discussing these "singularly significant developments").

[11] *See Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137 (1999); *General Elec. Co.* v. *Joiner*, 522 U.S. 136 (1997); *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

[12] Notably, Petitioner's case involves these very factors: (1) new DNA testing, not available at the time of his state-court proceedings, that proves that semen on the victim's nightgown was not his and (2) now-undisputed mishandling of the victim's serological (blood) evidence (albeit the timing of the mishandling remains disputed).

Schlup were handed down.[13] Only in 2000 did the ABA first formally recognize "the need to study the apparently emerging instances of convicted persons who are exonerated by DNA and other biological evidence." ABA Report 115, *supra*, at 2.[14] That Report noted that "DNA testing has been made widely available" only in "the [past] seven years." *Id.* at 3. Explaining that "[w]ith the recent development of DNA testing, ... science presents an opportunity to both improve the reliability of the criminal justice system, and to reveal the errors of the past," the Report recommended that DNA and other biological evidence be permitted to be raised in challenge to convictions *"no matter when such evidence is discovered,"* in order to "ensure the equitable dispensation of justice." *Id.* at 1, 4 (emphasis added).[15]

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[13] As a United States Department of Justice report recognized in 1999, DNA exonerations have changed the perspective on which *Herrera* (and, we would add, *Schlup*) was based: the notion that "there is [with the passage of time] no guarantee that the guilt or innocence determination would be any more exact." *Herrera*, 506 U.S. at 403. Rather than "the passage of time only diminish[ing] the reliability of" criminal guilt/innocence evidence (*id.*), "[t]o the contrary, the probative value of DNA testing has been steadily increasing." Nat'l Inst. of Justice, U.S. Dep't of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 9-10 (NIJ 177626, Sept. 1999). Thus, this NIJ Report concluded, "[t]he strong presumption that verdicts are correct, one of the underpinnings of restrictions on postconviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA test results." *Id.* at 10.

[14] The accompanying Report can be found at ABA, *Reports with Recommendations to the House of Delegates*, ABA Annual Meeting, New York, New York, July 10-11, 2000 (2002).

[15] Congress took the same view in the 2004 Innocence Protection Act: "[I]f DNA test results ... exclude the applicant as the source of the DNA evidence," a defendant must be permitted to file a motion for new trial or resentencing "[n]otwithstanding any law that would bar [such] a motion ... as untimely." H.R. 5107, § 411, *codified at* 18 U.S.C. § 3600(g)(1).

Similarly, Criminal Justice Standard for Post-Conviction Relief 22-2.1 provides in relevant part that "A post-conviction proceeding should be sufficiently broad to provide relief: (a) for meritorious claims ... (v) that there exists evidence of material facts which were not, and in the exercise

This ABA policy supports the principle that courts should be empowered to overlook procedural bars when material DNA or other scientific evidence that could not have been offered at the time of conviction is proffered in support of an innocence claim. Standards that this Court develops in furtherance of *Herrera* and *Schlup* should be sufficiently robust to accommodate advances in our understanding of biological evidence and its abuses.

2. **The Innocence Resolutions.** Although the revolution in forensic DNA analysis provided the initial stimulus for many "actual innocence" cases, the systemic shortcomings of the criminal justice system that have sometimes led to erroneous convictions are not limited to flaws in forensic evidence, and they cannot always be corrected simply by new scientific testing.[16] To study issues beyond DNA, the ABA formed an Ad Hoc Committee to Ensure the Integrity of the Criminal Process, in order to recommend policies that could address other flaws in the criminal justice system that have produced the conviction of actually-innocent defendants.

The result has been a series of nine separate Innocence Resolutions adopted by the ABA's House of Delegates between February 2004 and August 2005. The primary goal as stated in many of the Resolutions is "to reduce the risk of

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of due diligence could not have been, theretofore presented ... and that now require vacation of the conviction or sentence." App. 13a-14a.

[16] Senate Report 20-21 ("The root causes of wrongful convictions are varied. They include flaws in eyewitness identification procedures, undue reliance on jailhouse informants, police misconduct and prosecutorial misconduct.... DNA testing ... is not a comprehensive solution .... Instead, the causes of wrongful convictions must be addressed directly.") Consequently, the Justice for All Act of 2004 addressed not only DNA evidence, but also related topics, such as funding and standards for crime laboratories, providing incentives for States to consider innocence claims, and adequate funding for competent capital defense counsel. *See* H.R. 5107, Sec. 1 (Table of Contents); *accord*, Samuel R. Gross et al., *Exonerations in the United States, 1989-2003*, 95 J. Crim. L. & Criminology 523, 524 (2005) (noting that out of 340 exonerations, 144 resulted from DNA evidence, and 196 by evidence of other problems).

convicting the innocent, while increasing the likelihood of convicting the guilty." App. 1a-4a, 6a. This latter point is critical: for every innocent person left imprisoned, a guilty one remains at large, and attention paid to non-frivolous innocence claims can benefit interests of the prosecution, defendants, and the general public. In innocence cases, the actual perpetrators are often identified in the process of exoneration, thereby serving the interests of justice and benefiting public safety.[17] As Congress recognized in entitling the Justice for All Act, ensuring avenues for the exoneration of innocent persons benefits all involved in the criminal justice system. *Accord*, Senate Report 1 ("The purpose of the Innocence Protection Act . . . is to help reduce the risk both that innocent persons will be put to death and that those guilty of violent crimes will remain at large."); H.R. Rep. No. 108-711 (2004), *reprinted in* 2005 U.S.C.C.A.N 2274, at 2278 (noting that encouraging accurate DNA testing and competent defense counsel "is the best way to ensure that the right person is convicted" as well as "prevent[ing] wrongful convictions").

The Innocence Resolutions address a number of now-recognized sources of erroneous convictions, and the ABA urges the Court to examine the Resolutions and the Reports that accompany them in full.[18] They bear directly on issues

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[17] For example, in this case, Petitioner's DNA evidence not only proved that it was not his semen on the victim's nightgown; it also proved that the semen was the victim's husband's. Investigatory resources were then redirected toward the husband, resulting in discovery of additional evidence exculpatory of House and inculpatory of the husband. *See House* v. *Bell*, 386 F.3d 668, 686-687 (6th Cir. 2004) (Merritt, J., dissenting). The husband, however, has never been prosecuted or charged.

[18] The complete texts of these Resolutions are reproduced in the Appendix. App. 1a-8a. Their accompanying Reports (which do not represent adopted ABA policy, but were before the House of Delegates when the policies were adopted and may help explain their rationale) can be found on the ABA's website at http://www.abanet.org/crimjust/news/home.html under "Ad Hoc Innocence Committee to Ensure the Integrity of the Criminal Process."

presented by Petitioner's case and place consideration of *Herrera* and *Schlup* within the contemporary understanding of factors that lead to valid innocence claims and exonerations. In addition to the new DNA evidence in this case (evidence that apparently disproves a central prosecution claim for both conviction and the death penalty) other factors addressed by the ABA's Innocence Resolutions are also present in Petitioner's case. Relevant excerpts include:

A. From *"Crime Laboratories and Forensic Evidence"* (App. 1a-2a): "[T]o reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty . . . , (1) . . . procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence. . . . (3) The appointment of defense experts for indigent defendants should be required whenever reasonably necessary to the defense. . . . (5) Counsel should have competence in the relevant area or consult with those who do where forensic evidence is essential in a case."

As the accompanying Report explained (at 2), although it seems "astounding[,] . . . a *third* of [exoneration] cases involved 'tainted or fraudulent science.'" The Report also concluded (at 13) that "incompetence of counsel cases involving scientific evidence are not hard to find."

In his federal habeas proceeding, Petitioner demonstrated to the satisfaction of all the judges that faulty forensic handling of the victim's blood samples—evidence that was central to the prosecution's case—occurred before trial. 386 F.3d at 682, 685. In addition, Petitioner complains of the "scientific" testimony the prosecution relied upon to argue that the semen on the victim's nightgown was Petitioner's—an argument now proven false by DNA analysis. *See id.* at 685. Compliance with the ABA's recommendations could well have avoided these flaws.

B. From *"Investigative Policies and Personnel"* (App. 3a): All jurisdictions should "[e]stablish and enforce written procedures and policies governing the collection and preservation of evidence and other aspects of the conduct of criminal investigations" and "[e]stablish adequate opportunity for

citizens and investigative personnel to report misconduct in investigations."

As the accompanying Report noted (at 2), "[t]he quality of a criminal investigation and prosecution turns on the actions of the law enforcement personnel." Moreover, "complaints and comments [about an investigation] should be taken seriously by the officials . . . because misconduct could lead to the conviction of an innocent person or the escape of a guilty party." *Id.* at 5.

Again, Petitioner has raised serious questions about the collection, handling, and preservation of the blood evidence and his blue jeans, a central link in the prosecution's case. 386 F.3d at 680-681. Additionally, Petitioner produced a witness who testified that she tried unsuccessfully to report to officials about a confession to the crime she had heard from the victim's husband. *Id.* at 683. The ABA Resolution indicates that concerns about these areas are not unwarranted.

C. From *"Prosecution Practices"* (App. 4a): "[T]o reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, . . . [jurisdictions should] (3) ensure that law enforcement agencies, laboratories and other experts understand their obligations to inform prosecutors about exculpatory or mitigating evidence."

The accompanying Report noted (at 2-3) "the integral role prosecutors play to ensure that fair process is followed" and emphasizes that "prosecutors should establish guidelines and procedures" not only for "turning *Brady* evidence over to the defense," but also for "receiving that information from its partners and agents including police department and laboratories."

Petitioner's evidence regarding the mishandling of the blood samples in his case suggests that agents of the prosecution possessed potentially exculpatory evidence that was not disclosed to Petitioner pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963), and its progeny.

The Report accompanying this Resolution also noted (at 5) that "among the many factors that lead to the wrongful conviction of the innocent, eyewitness testimony and confessions were the most problematic." In the federal evidentiary hearing below, the eyewitness conceded that his trial testimony had been inaccurate, and Petitioner's evidence challenging the eyewitness testimony that placed him near the scene where the body was found was sufficient to lead the majority to question it. 386 F.3d at 679 (positing "even if we accept [the] contention that" the eyewitness testimony was false). Conditions that might explain Petitioner's initial, false statements to investigators were also presented below. The ABA's study of such factors is relevant to this Court's consideration of how such evidence should be evaluated under *Schlup* and *Herrera*.[19]

D. From *"Defense Counsel Practices"* (App. 6a-7a): Jurisdictions should "establish[] standards of practice for defense counsel in serious non-capital criminal cases that: ... (5) require defense counsel to investigate circumstances indicating innocence regardless of ... facts constituting guilt ...."

As the accompanying Report noted (at 3), "the role of defense counsel is critical" to ensure that the guilty are accurately convicted and the innocent are not. Because the ABA has adopted elsewhere "Guidelines for the ... Performance of Defense Counsel in Death Penalty Cases," *see Rompilla* v. *Beard*, 125 S. Ct. 2456, 2466 n.7 (2005) (citing these ABA Guidelines with approval), the Innocence Resolution on this topic addresses only other "serious criminal cases." Report at 4. This Court has also recognized that in-

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[19] In this regard, two of the ABA's Resolutions deal directly, and at length, with improvements that ought to be made in the contexts of eyewitness identification and interrogations. App. 1a, 2a-3a. While not directly relevant to Petitioner's case, these Resolutions and their accompanying Reports are relevant to this Court's consideration of the general category of actual innocence cases, as these two areas were identified in the Prosecution Policies Report (at 5) as the "most problematic" of all.

effective investigation by defense counsel can give rise to a Sixth Amendment violation regarding "penalty innocence" as well as innocence of the crime. *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) (citing ABA guidelines). The ABA's Innocence Resolution Report on this topic (at 9) "concluded that establishing, implementing, and enforcing heightened standards for such defense counsel would tend to avoid instances of the innocent being wrongly convicted."

Petitioner seeks to demonstrate that he was denied the effective assistance of counsel—provided the *Schlup* "gateway" can be crossed. As just one example of the constitutional inadequacy of his counsel, Petitioner pointed out that no fewer than *five* exculpatory witnesses (*see* 386 F.3d at 686-687) were located ten years later—two of whom testified without obvious bias to having heard a contemporaneous confession to the crime by someone other than Petitioner.[20]

The ABA's Innocence Resolutions underscore the compelling need for *courts* to examine the merits of claims presented by potentially innocent persons, for two additional reasons.

First, the recommended policies have not yet been adopted, let alone implemented, in many jurisdictions. They certainly were not in place a decade ago or more, when many defendants with highly plausible claims of innocence (including Petitioner) were convicted. Thus, the flaws observed by Congress in connection with the Innocence Protection Act, and by the ABA in the work described above, are likely to

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[20] Another Resolution, "*Systemic Remedies*" (App. 7a-8a), "urges federal, state and territorial governments to identify and attempt to eliminate the causes of erroneous convictions." The accompanying Report states (at 3) that "[i]t is time to adopt an explicit innocence exception to current bars to obtaining habeas review." This Resolution simply underscores the fact that there are other systemic flaws in the criminal justice system that need to be addressed at fundamental levels, if erroneous convictions are to be avoided. The ABA is continuing to study these flaws, and further development of bipartisan policies is anticipated.

be pervasive and difficult to prove in the habeas context for some time to come.

Second, and as a direct consequence of the first point, in many cases the very evidence that could conclusively exonerate an individual has been lost precisely because of the identified problems, such as: the failure of defense counsel to conduct a timely or thorough investigation, the loss or contamination of evidence due to faulty law enforcement and forensic guidelines and techniques, and the failure to provide all exculpatory evidence at the time of trial.

During the necessarily cautious process of studying and accepting improvements to the criminal justice system designed to prevent erroneous convictions, federal habeas courts will necessarily be asked to act as protectors of those who may be actually innocent. If federal courts are to assure that only culpable defendants are punished, this Court must set standards that allow for the possibility that a defendant with a colorable claim of innocence may be unable to produce evidence that would satisfy the extremely exacting standard adopted by the *en banc* majority in this case precisely *because* of the systemic shortcomings that led to their erroneous conviction in the first place. The Court should therefore adopt a sufficiently robust standard of review to permit full examination of such claims. The standard should acknowledge that the same flaws that can lead to erroneous convictions can also lead to shortcomings in proof years later. Otherwise, potentially innocent defendants will be denied review of the very defects in the system that initially violated their rights and led to an unjust result.

3. **Capital Habeas Corpus Litigation Policies.** In 1988 the ABA formed a Task Force to comprehensively study capital cases in the context of federal habeas corpus review. *See* Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases* (ABA 1990), *reprinted in* 40 Am. U.L. Rev. 1, 13 (1990) ("A Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus") ("1990 Report"). The Task Force, comprised of state and federal

judges, prosecutors and defense counsel, court administrators, and academics, proposed, and the ABA adopted, policies addressing the handling of federal habeas corpus petitions in the capital context. *Id.* at 9-12; App. 9a-12a. The purpose of the policies is to "enhance both the efficiency and the fairness of state and federal review procedures." 40 Am. U.L. Rev. at 13.

Two paragraphs of the ABA's Capital Habeas Corpus Litigation policies are particularly relevant to the question when to allow federal courts to overlook procedural bars in order to examine constitutional claims in the innocence context.

First, paragraph 13 (App. 11a-12a), which recommended a "one-year limitations period" for federal habeas petitions, expressly provides that such "time requirements should be waived where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner's ineligibility for the death penalty" (App. 12a).

The ABA borrowed this "colorable claim" of innocence standard directly from this Court's then-most recent decision on point, *Kuhlman* v. *Wilson*, 477 U.S. 436, 454 (1986). The *Kuhlman* Court had expressly "adopt[ed]" a "colorable claim of factual innocence ... standard" to define when an otherwise-applicable procedural bar to federal habeas review should be overlooked to satisfy the "ends of justice" exception previously expressed in *Sanders* v. *United States*, 373 U.S. 1 (1963). *See* 477 U.S. at 444-445, 454.[21]

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[21] The *Kuhlman* Court noted (477 U.S. at 454) that it was borrowing its "colorable showing" language from Judge Henry Friendly's famous article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-148 (1970).

Because three other Justices would have adopted an even more forgiving standard, "colorable claim" represented the maximum standard for actual innocence habeas claims, agreed upon without dissent by at least seven members of this Court. *See* 477 U.S. at 454 (Powell, J., joined by Burger, CJ., and Rehnquist & O'Connor, JJ.) ("colorable showing ... col-

Five years after the ABA adopted paragraph 13, this Court endorsed the "colorable claim of factual innocence" standard from *Kuhlman* in *Schlup* v. *Delo*, 513 U.S. at 322. The Court noted (*id.*) that in *Kuhlman* it had "elaborated" that this phrase represented a "fair probability" standard or, in other words, a "probably" standard as explained in *Murray* v. *Carrier*, 477 U.S. 478 (1986) (decided the same day as *Kuhlman*). In adopting this "colorable claim, fair probability" standard for actual innocence "gateway" claims, *Schlup* expressly rejected a more stringent "clear and convincing" standard that had been suggested in a prior case (*Sawyer* v. *Whitley*, 505 U.S. 333 (1992)). 513 U.S. at 323, 326-327.[22] The *Schlup* Court explained that actual innocence represents a "miscarriage of justice" exception to normal habeas corpus cause-and-prejudice rules, and that its choice of a "colorable claim ... probability" standard represented "less of a threat to scarce judicial resources and to principles of finality and comity" in the actual innocence context. *Id.* at 322, 324. Meanwhile, the "individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Id.* at 324-325. Thus a "somewhat less exacting standard of proof" is appropriate." *Id.* at 325.

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orable claim of factual innocence"); *id.* at 476 (Stevens, J., dissenting) ("colorable claim of innocence"); *id.* at 466 (Brennan, J., dissenting, joined by Marshall, J.) (arguing that colorable claim of innocence is too narrow a standard). Chief Justice Burger and Justice White did not join the "colorable claim" portion of Justice Powell's opinion, nor did they explain why.

[22] *Schlup* noted that *Sawyer* had adopted a "clear and convincing" standard for death penalty-innocence cases, as distinguished from claims of innocence of the underlying crime. 513 U.S. at 323. To this extent, *Sawyer* has rejected the ABA's 1990 policy recommendation in paragraph 13 of a "colorable claim" standard for penalty-ineligibility. It would not be unreasonable, however, to revisit this stringent standard for penalty-innocence claims in light of the dramatically changed landscape of "actual innocence" exonerations which was simply not appreciated at the time of *Sawyer*.

Second, paragraph 14 of the ABA's 1990 policy (App. at 12a) also speaks to when a court should overlook a procedural bar in the face of an actual innocence claim. Paragraph 14 recommends that the procedural bar to *successive* habeas petitions (which the petition in this case is not) should not be applied if a petitioner advances "facts ... sufficient ... to undermine the court's confidence in the jury's determination of guilt on the offense." Virtually identical language was employed subsequently in *Schlup*, where the Court explained that a habeas petitioner could get through the "gateway" if his "new facts raised sufficient doubt about guilt to undermine confidence in the result of the trial." 513 U.S. at 317. There is no indication that the ABA in 1990—or this Court five years later in *Schlup*—perceived any substantive difference between this phrasing and the "colorable claim" language employed elsewhere in both *Schlup* and the 1990 policy. It is simply another way of describing the standard of proof for an innocence claim in the death penalty habeas context.[23]

While the ABA does not recommend a particular standard of review for this Court, it urges the Court to adopt a standard that is robust enough to fairly evaluate nonfrivolous claims of innocence on their merits. The standard should be informed by the fact that conclusive proof of innocence may itself be hamstrung by the very flaws that led to the claimed erroneous conviction. A standard consistent with the policies advanced by in paragraphs 13 and 14 of the 1990 Capital Habeas Corpus Litigation policies would promote this goal.

As Justice Stevens explained for the Court in *Schlup*, innocence claims that actually meet the standard will be "rare"—yet the "compelling" interest "in avoiding injustice" will be met by not rejecting claims that show a probability of innocence. 513 U.S. at 321, 324. The standards adopted and

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[23] In 1997, after *Schlup* was decided, the ABA endorsed the 1990 policies when it adopted its Death Penalty Moratorium resolution. App. 8a-9a.

applied by this Court for modern-day innocence claims should fairly accommodate the dramatically changed criminal justice landscape revealed by recent "actual innocence" exonerations—a pattern of exonerations that was simply not appreciated at the time of *Herrera*, *Sawyer*, or *Schlup*.[24]

CONCLUSION

This Court should take into account the dramatically changed legal and factual landscape resulting from innocence exonerations that have become increasingly frequent in recent years in formulating and applying evidentiary standards for actual innocence claims. A robust standard should be adopted—one that acknowledges that new DNA testing may not have been available at the time of many state-court proceedings and that allows for the possibility that the very flaws that lead to erroneous convictions can also lead to shortcomings of proof subsequently in habeas proceedings. The ABA's Innocence Resolutions, Biological Evidence Principles, and 1990 Capital Habeas Corpus Litigation policies should be considered in this regard.

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[24] *See* 513 U.S. at 321-322 & n.36 (noting that no party had cited a proven "actual innocence" case and that, at that time (1995), the Court itself could find only two such decisions, indicating that valid actual innocence cases are "rare" and "extraordinary"). In addition to the path-breaking 1996 NIJ report *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (Dep't of Justice 1996), *available at* http://www.ncjrs.org/pdffiles/dnaevid.pdf, popular understanding and acceptance of the actual innocence phenomenon can be traced to James S. Leibman *et al.*, *A Broken System: Error Rates in Capital Cases, 1973-1995*" (Columbia University, 2000), *available at* http://ccjr.policy.net/proactive/newsroom/release.vtml?id=18200 and Barry Scheck, Peter Neufield & Jim Dwyer, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongfully Convicted* (2000). Thus, the Death Penalty Information Center reports that the rate of death penalty exonerations almost tripled only recently, in the six-year period from 1998 to 2003. http://www.deathpenaltyinfo.org/article.php?did=412&scid=6. Today, while still uncommon, exonerations have become a well-recognized, if disturbing, facet of our criminal justice system.

Respectfully submitted,

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APPENDIX

AMERICAN BAR ASSOCIATION APPROVED INNOCENCE RESOLUTIONS, 2004-2005

MIDYEAR MEETING 2004

I. INTERROGATIONS:

RESOLVED, That the American Bar Association urges all law enforcement agencies to videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of such custodial investigations.

FURTHER RESOLVED, That the American Bar Association urges legislatures and/or courts to enact laws or rules of procedure requiring videotaping of the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to require the audiotaping of such custodial interrogations, to provide necessary funding, and to provide appropriate remedies for non-compliance.

Annual Meeting 2004

II. CRIME LABORATORIES AND FORENSIC EVIDENCE—111B (CJS):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.

2. Crime laboratories and medical examiner offices should be adequately funded.

3. The appointment of defense experts for indigent defendants should be required whenever reasonably necessary to the defense.

4. Training in forensic science for attorneys should be made available at minimal cost to ensure adequate representation for both the public and defendants.

5. Counsel should have competence in the relevant area or consult with those who do where forensic evidence is essential in a case.

III. EYEWITNESS IDENTIFICATION—111C (CJS):

RESOLVED, That the American Bar Association adopts the American Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures dated August 2004.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Police and prosecutors craft detailed guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy;

2. Police and prosecutors receive periodic training on how to implement the above-referenced guidelines,

3. Police and prosecutors receive periodic training on non-suggestive techniques for interviewing witnesses;

4. Internal mechanisms be created within police departments and prosecutors' offices to periodically update such guidelines to incorporate advances in social scientific research and in the continuing lessons of practical experience; and

5. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the American Bar

Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures dated August 2004.

FURTHER RESOLVED, That the American Bar Association, to improve the ability of juries and judges to make fully informed trial decisions concerning the accuracy of eyewitness identifications, urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Courts should have the discretion, where appropriate in an individual case, to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy; and

2. Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should consider exercising their discretion to use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging the accuracy of the identification.

IV. INVESTIGATIVE POLICIES AND PERSONNEL: (111E (CJS))

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Establish and enforce written procedures and policies governing the collection and preservation of evidence and other aspects of the conduct of criminal investigations;

2. Establish training programs and disciplinary procedures to assure that investigative personnel are prepared and accountable for their performance;

3. Establish adequate opportunity for citizens and investigative personnel to report misconduct in investigations; and

4. Establish adequate funding for all of the above.

V. PROSECUTION PRACTICES (111F (CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by adopting the following principles:

1. Provide adequate funding to prosecutors' offices;

2. Establish standards to ensure that workloads of prosecutors are maintained at levels that allow them to provide competent legal representation;

3. Ensure that law enforcement agencies, laboratories and other experts understand their obligations to inform prosecutors about exculpatory or mitigating evidence;

4. Establish procedures for evaluating cases that rely upon eyewitness identification, confessions or testimony from witnesses that receive a benefit; and

5. Draft legislation to provide that material evidence be preserved for a reasonable period of time after criminal appeals are exhausted to permit post-conviction review.

MIDYEAR MEETING 2005

VI. COMPENSATION FOR THE WRONGFULLY CONVICTED (108A (CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial jurisdictions to enact statutes to adequately compensate persons who have been convicted and incarcerated for crimes they did not commit.

FURTHER RESOLVED, The American Bar Association urges jurisdictions to consider the following factors in drafting a compensation statute:

A. Conditions Precedent:

1. Statutes should require claimants to have been incarcerated as the result of a conviction.

2. Claimants must be able to show that their convictions were vacated or pardoned on a ground demonstrating actual innocence, which for this purpose re-

quires that the claimant did not commit the crime, or the crime did not occur.

3. The claimant's own misconduct should not have substantially contributed to the conviction. A false confession or guilty plea does not automatically bar recovery.

B. The size of the award:

1. The award should be in proportion to the time served;

2. The award should be based upon economic loss;

3. The award should include non-economic losses, such as pain and suffering, humiliation, loss of consortium, and loss of reputation; and

4. Claimants are eligible for compensation only if, but for this conviction, the claimant would not have been incarcerated. The government should have the burden of demonstrating that the claimant would have otherwise been incarcerated.

C. A successful claimant shall be entitled to receive reasonable attorneys fees in connection with establishing the claim of actual innocence.

D. Judgment should include relief from all governmental obligations incurred as a result of the trial, conviction and incarceration of the claimant, and restoration of all rights lost as a result thereof.

E. The court or executive authority that releases an individual based on actual innocence should give that person notice of the statutory compensation scheme.

1. Any suit must be brought within one year of notice.

2. If the claimant was not given notice, suit must be commenced within two years after exoneration is final or after the adoption of a compensation statute.

F. Jurisdictions should assist the innocent to reenter the community.

1. Assistance should be provided that is at least equivalent to that available to individuals on probation or parole.

2. The erroneous judgment of conviction should be expunged from the innocent's criminal record.

VII. JAILHOUSE INFORMANTS (108B (CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by ensuring that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony.

VIII. DEFENSE COUNSEL PRACTICES (108C CJS)):

RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to reduce the risk of convicting the innocent by establishing standards of practice for defense counsel in serious non-capital criminal cases that:

1. Formalize the means for providing appropriately experienced and qualified appointed or assigned defense counsel in serious criminal cases, modeled after the means prescribed in Standards 5-1.2 and 5-1.3 of the ABA Standards for Criminal Justice Providing Defense Services and in the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, by:

a) Adopting and implementing a Criminal Defense Plan to be administered by a Responsible Agency, which is either a defender organization or an independent authority; and

b) Authorizing the Responsible Agency to establish and publish recommended standards for defense representation, including knowledge, training, and experience in the defense of serious criminal cases, and using as a guide the requirements enumerated in Standard 5-2.2 of the ABA Standards for Criminal Justice Providing Defense Services:

2. Ensure that the workloads of defense counsel be maintained at levels that enable them to provide the level of representation recommended by the Criminal Defense Plan, using as a guide he requirements enumerated in Standard 5-5.3 of the ABA Standards for Criminal Justice Providing Defense Services;

3. Ensure that defense counsel are compensated at rates no less than comparable prosecutors and that other defense team members are compensated at rates no less than comparable professionals in the private sector; using as a guide the requirements enumerated in Standard 5-2.4 of the ABA Standards for Criminal Justice Providing Defense Services;

4. Ensure that defense counsel have adequate resources and training to fulfill their obligation to conduct thorough and independent investigation into their clients' guilt or innocence in every case, including heightened scrutiny into cases that rely on eye-witness identification, witnesses who receive any benefit in return for their testimony, and confessions by youthful or mentally limited defendants;

5. Require defense counsel to investigate circumstances indicating innocence regardless of the client's admissions or statements of facts constituting guilt or the client's stated desire to plead guilty or dispose of the case without trial;

6. Require that defense counsel cooperate fully with successor counsel, including the preservation and transfer of all pertinent records and information;

7. Require defense counsel in all cases, whether or not serious criminal cases, to meet the requirements enumerated in the ABA Standards for Criminal Justice Providing Defense Services.

ANNUAL MEETING 2005

IX. SYSTEMIC REMEDIES (115A (CJS)):

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to identify and attempt to eliminate the causes of erroneous convictions.

FURTHER RESOLVED, That the American Bar Association urges state and local bar associations to assist in the effort to identify and attempt to eliminate the causes of erroneous convictions.

AMERICAN BAR ASSOCIATION
BIOLOGICAL EVIDENCE PRINCIPLES
(ADOPTED AT THE 2000 ANNUAL MEETING)

RESOLVED, That the American Bar Association urges federal, state, local and territorial jurisdictions to adhere to the following Principles concerning Biological Evidence collected in conjunction with the investigation of a criminal case:

1. All biological evidence should be preserved.

2. All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of law.

3. All necessary funding to accomplish these principles should be provided.

4. Appropriate scientific and privacy standards should be developed to guide the preservation of biological evidence.

AMERICAN BAR ASSOCIATION
DEATH PENALTY MORATORIUM POLICY
(ADOPTED AT THE 1997 MIDYEAR MEETING)

#107

RESOLVED, That the American Bar Association calls upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with the following longstanding American Bar Association policies intended to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed:

(i) Implementing ABA "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases" (adopted Feb. 1989) and Association policies intended to encourage competence of counsel in capital cases (adopted Feb. 1979, Feb. 1988, Feb. 1990, Aug. 1996);

(ii) Preserving, enhancing, and streamlining state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings (adopted Aug. 1982, Feb. 1990);

(iii) Striving to eliminate discrimination in capital sentencing on the basis of the race of either the victim or the defendant (adopted Aug. 1988, Aug. 1991); and

(iv) Preventing execution of mentally retarded persons (adopted Feb. 1989) and persons who sere under the age of 18 at the time of their offenses (adopted Aug. 1983).

FURTHER RESOLVED, That in adopting this recommendation, apart from existing Association policies relating to offenders who are mentally retarded or under the age of 18 at the time of the commission of the offense, the Association takes no position on the death penalty.

AMERICAN BAR ASSOCIATION
DEATH PENALTY HABEAS CORPUS LITIGATION POLICIES (ADOPTED AT THE 1990 MIDYEAR MEETING, AND RETAINED AT THE 2000 ANNUAL MEETING)

115E (CJS)

BE IT RESOLVED, That the American Bar Association urges that the following measures be taken in the litigation of death penalty cases:

1) Because many of the defects and delays in habeas corpus procedure are due to the fact that the accused was not represented by competent counsel, particularly at the trial level, the state and federal governments should be obligated to provide competent and adequately compensated counsel for capital defendants / appellants / petitioners, as well as to provide sufficient resources for investigation, ex-

pert witnesses, and other services, at all stages of capital punishment litigation. The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases should govern the appointment and compensation of counsel.

2) The individual or organization responsible for appointing counsel should enlist the assistance of the local bar association and resource center to seek the best qualified attorneys available.

3) Jurisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases.

4) New counsel should be appointed to represent the death-sentenced inmate for the state direct appeal unless the appellant requests the continuation of trial counsel after having been fully advised of the consequences of his or her decision, and the appellant waives the right to new counsel on the record.

5) To avoid the delay occasioned by the appointment of new counsel for post-conviction proceedings and to assure continued competent representation, state appellate counsel who represented a death-sentenced inmate should continue representation through all subsequent state, federal, and United States Supreme Court proceedings.

6) To assure that the state provides competent representation and to avoid procedural delays as well as multiple review of the same issues, the following procedural barriers to federal habeas corpus review should not apply with respect to any state court proceeding at which the state court, in deprivation of the right to counsel recognized in paragraph "1" above, failed to appoint competent and adequately compensated counsel to represent the defendant/appellant/petitioner:

(a) exhaustion of state judicial remedies,

(b) procedural default rules; and

(c) the presumption of correctness of state court findings of fact.

7) Federal courts should not rely on state procedural bar rules to preclude consideration of the merits of a claim if the prisoner shows that the failure to raise the claim in a state court was due to the ignorance or neglect of the prisoner or counsel or if the failure to consider such a claim would result in a miscarriage of justice.

8) State appellate courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly raised at trial and on appeal and should have a plain error rule and apply it liberally with respect to errors of state law.

9) On the initial state post-conviction application, state post-conviction courts should review under a knowing, understanding, and voluntary waiver standard all claims of constitutional error not properly preserved at trial or on appeal.

10) The federal courts should adopt rules designed to facilitate both the presentation of all available claims in the first habeas corpus petition and the prompt exhaustion of any unexhausted claims in order to eliminate the problem of procedurally forced successive petitions.

11) A rational process of review will be facilitated by a stay of execution that remains in force until the completion of the initial round of state and federal post-conviction review. Therefore, unless the state courts grant a stay of execution, the federal courts, in preservation of their habeas corpus jurisdiction, should grant a stay of execution to run from the initiation of state post-conviction proceedings through the completion of the initial round of federal habeas corpus proceedings, and should be empowered to do so.

12) The petitioner should have a right of appeal from denial of an initial federal habeas corpus petition without the need to obtain a certificate of probable cause.

13) A one-year limitations period should be employed as a substitute mechanism to move the case toward reasonably

prompt completion, but only with adequate and sufficient tolling provisions to permit full and fair consideration of a petitioner's claims in state court, federal court, and the United States Supreme Court. The sanction for failure to comply with the time requirements should be dismissal, except that the time requirements should be waived where the petitioner has presented a colorable claim, which has not been presented previously, either of factual innocence or of the petitioner's ineligibility for the death penalty.

14) A federal court should entertain a second or successive petition for habeas corpus relief if:

(a) the request for relief is based on a claim not previously presented by the prisoner in the state and federal courts and the failure to raise the claim is the result of state action in violation of the Constitution or laws of the United States, the result of Supreme Court recognition of a new federal right that is retroactively applicable, or based on a factual predicate that could not have been discovered through the exercise of reasonable diligence; or

(b) the facts underlying the claim would be sufficient, if proven, to undermine the court's confidence in the jury's determination of guilt on the offense or offenses for which the death penalty was imposed; or

(c) consideration of the requested relief is necessary to prevent a miscarriage of justice.

15) The standard for determining whether changes in federal constitutional law should apply retroactively should be whether failure to apply the new law would undermine the accuracy of either the guilt or the sentencing determination.

16) To afford the states a reasonable time to adopt and implement rules and procedures pursuant to these recommendations, the proposed federal statutory and rule changes should take effect upon adoption by the states of provisions in accordance with these recommendations, but not later

than two years from the date of enactment of federal legislation; and

BE IT FURTHER RESOLVED, That the American Bar Association commends to Congress the sample legislation attached in Appendix "B" as a way to implement these Recommendations.

ABA CRIMINAL JUSTICE STANDARDS ON POST-CONVICTION REMEDIES (APPROVED AUGUST 1978)

Standard 22-2.1. Grounds for relief encompassed

A postconviction proceeding should be sufficiently broad to provide relief:

(a) for meritorious claims challenging judgments of conviction and sentence, including cognizable claims:

(i) that the conviction was obtained or sentence imposed in violation of the Constitution of the United States or the constitution or laws of the state in which the judgment was rendered;

(ii) that the applicant was convicted under a statute that is in violation of the Constitution of the United States or the constitution of the state in which judgment was rendered, or that the conduct for which the applicant was prosecuted is constitutionally protected;

(iii) that the court rendering judgment was without jurisdiction over the person of the applicant or the subject matter;

(iv) that the sentence imposed exceeded the maximum authorized by law or is otherwise not in accordance with the sentence authorized by law;

(v) that there exists evidence of material facts which were not, and in the exercise of due diligence could not have been, theretofore presented and heard in the proceedings leading to conviction and sentence, and that now require vacation of the conviction or sentence;

(vi) that there has been a significant change in law, whether substantive or procedural, applied in the process leading to applicant's conviction or sentence where sufficient reason exists to allow retroactive application of the changed legal standard;

(b) for meritorious claims challenging the legality of custody or restraint based upon a judgment of conviction, including claims that a sentence has been fully served or that there has been unlawful revocation of parole or probation or conditional release.

ABA CRIMINAL JUSTICE STANDARDS ON THE PROSECUTION FUNCTION (APPROVED FEBRUARY 1992)

Standard 3-1.2 The Function of the Prosecutor

(a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.

(b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

(d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.

(e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

PAUL GREGORY HOUSE, *Petitioner,*

v.

RICKY BELL, *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF CALIFORNIA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, AND WASHINGTON IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. May a federal habeas court adjudicate Petitioner's procedurally defaulted ineffective-assistance-of-counsel claim under the "actual innocence" exception announced in *Schlup v. Delo*, 513 U.S. 298 (1995) when the petitioners does no more than raise questions about the reliability of portions of trial testimony or the manner in which physical evidence was handled or analyzed?

2. May a federal habeas court grant Petitioner's petition based on his freestanding claim of actual innocence?

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